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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Petitioners,

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., *et al.*,

and

FEDERICO PEÑA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE STATUTE ITSELF RESOLVES THIS QUESTION QUITE CLEARLY	4
II. THE UNIONS' "SAFETY" ARGUMENT IS INSUPPORTABLE	12
A. The Railroad Industry Has an Exemplary Safety Record	12
B. The Mechanics and Economics of Train-Crew Work Schedules	14
C. The Relationship Between the HSA, Work Schedules, and Safety	18
CONCLUSION	24

TABLE OF AUTHORITIES

CASES — Page

Atchison, Topeka & Santa Fe Railway Co. v. United States, 269 U.S. 266 (1925) 7
Chicago & Alton Railroad Co. v. United States, 247 U.S. 197 (1918) 4
Smoot's Case, 82 U.S. (15 Wall.) 36 (1873) 24
United States v. Atchison, Topeka & Santa Fe Railway Co., 525 F.2d 1184 (9th Cir. 1975), *cert. denied*, 425 U.S. 992 (1976) 9
United States v. Great Northern Railway Co., 285 F. 152 (9th Cir. 1922) 5
United States v. Pennsylvania Railroad Co., 275 F. Supp. 345 (W.D. Pa. 1967) 11
United States v. St. Louis-San Francisco Railway Co., 572 F.2d 1224 (8th Cir.), *cert. dismissed*, 439 U.S. 973 (1978) 9
United Transportation Union v. Skinner, 975 F.2d 1421 (9th Cir. 1992) 4, 11

STATUTES

Act of Mar. 4, 1907, ch. 2939, 34 Stat. 1416 5
Hours of Service Act, 49 U.S.C. §§ 20102, 21101-21108, 21303-21304 (formerly 45 U.S.C. §§ 61-64b) ..... *passim*
§ 6(a), 108 Stat. 1378 (1994) 2
Pub. L. No. 91-169, 83 Stat. 463 (1969) 5
Pub. L. No. 95-574, 92 Stat. 2461 (1978) 9

MISCELLANEOUS

Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Injuries and Illnesses in the United States By Industry, 1992* (1994) 12
115 Cong. Rec. 29,318-29,326 (1969) 6, 17
Economics, Policy and Statistics Department, Association of American Railroads, *Railroad Facts* (1994 ed.) 13
Economics, Policy and Statistics Department, Association of American Railroads, *Railroad Facts* (1989 ed.) 13
58 Fed. Reg. 18,163 (1993) 2, 12, 18

TABLE OF AUTHORITIES—Continued

Page

FRA Accident/Incident Bulletin Nos. 150-63 13
H.R. 8365, 95th Cong., 1st Sess. (1977) 10
H.R. 8449, 91st Cong., 1st Sess. (1969) 8-9
H.R. Rep. No. 180, 103d Cong., 1st Sess. (1993) 2
H.R. Rep. No. 469, 91st Cong., 1st Sess. (1969) 6
Hours of Service Act Amendments of 1969: Hearings Before the House Comm. on Interstate and Foreign Commerce, 91st Cong., 1st Sess. (1969) 5-6, 8-9
Leave Hours of Service Act Intact, GAO Tells Congress, US Rail News, June 24, 1992 10-11
Locomotive Engineers President Advocates Legislative Reforms to Improve Rail Safety, Daily Labor Report No. 73 (BNA), Apr. 16, 1986 11
National Safety Council, *Accident Facts* (1994 ed.) 12
Rail Safety: GAO Report Predicts Only Minor Impact of 12-Hour Shift Limit On Accident Rate, O.S.H. Daily (BNA), June 22, 1992 10
Railroad Safety Authorization for Fiscal Year 1979: Hearings Before the House Subcomm. on Transp. and Commerce of the Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. (1978) 10
S. Rep. No. 604, 91st Cong., 1st Sess. (1969) 6, 16-17
U.S. General Accounting Office, GAO/RCED-92-133, Railroad Safety: Engineer Work Shift Length and Schedule Variability (1992) ..... *passim*
U.S. General Accounting Office, GAO/RCED-93-160BR, Railroad Safety: Human Factor Accidents and Issues Affecting Engineer Work Schedules (1993) ..... *passim*

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS SUPPORTING RESPONDENTS

INTEREST OF AMICUS

The Association of American Railroads (AAR) is a voluntary, nonprofit trade association whose members account for 75% of the total line-haul mileage, produce 93% of the total freight revenues, and employ 91% of the 213,000-person freight-railway workforce in the United States.[1] AAR represents its members on matters of common concern before Congress, before regulatory agencies, and in an *amicus* capacity before the courts. The issue at stake here—the proper interpretation of "time on duty"

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[1] Letters of consent to the filing of this brief by all parties have been filed with the Clerk.

under the Hours of Service Act, 49 U.S.C. § 21103 ("the HSA" or "the Act")[2]—is one such matter of common concern, as it could substantially affect the operations of railroads throughout the United States.

STATEMENT OF THE CASE

In 1992 the United States Department of Transportation's Federal Railroad Administration (FRA) reversed its longstanding position and contradicted 85 years of industry practice by reinterpreting "time on duty," within the meaning of the Hours of Service Act of 1907. Under the FRA's 1992 interpretation, "time on duty" includes the time that train crew members spend after they have completed their duty assignment and have been relieved from all train-operating responsibilities, but before the railroad begins transporting them to their place of final release. *See* 58 Fed. Reg. 18,163 (1993); J.A. 73-77 (Letter from FRA Chief Counsel S. Mark Lindsey to Robert W. Blanchette (Oct. 28, 1992)). Respondent railroads petitioned the United States Court of Appeals for the Seventh Circuit for review of the FRA's new interpretation. On December 29, 1994, the Seventh Circuit, sitting *en banc*, unanimously held that time spent waiting for "deadhead transportation"[3] from a duty assignment to the place of final release is *not* "time on duty" under the HSA. 44 F.3d 437, 445. Although the FRA and the Department of Transportation have subsequently reverted to their initial position and now join this case as respondents (on the side of the railroads), the Brotherhood of

[2] When this suit was commenced, the Act was codified at 45 U.S.C. §§ 61-64b. In 1994 the Act was recodified at 49 U.S.C. §§ 20102, 21101-21108, 21303-21304. (Only § 21103 is at issue here.) Congress intended the recodification to effect no substantive changes in the law. *See* § 6(a), 108 Stat. 1378 (1994); H.R. Rep. No. 180, 103d Cong., 1st Sess. 1-5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818-22.

[3] When a railroad moves its train crews to or from a duty assignment, it is known as "deadhead transportation."

Locomotive Engineers and the United Transportation Union ("the Unions") continue to oppose the Seventh Circuit's interpretation of the Act.

SUMMARY OF ARGUMENT

1. Congress enacted the Hours of Service Act in 1907 to promote railroad safety by limiting the number of consecutive hours that certain train employees (including locomotive engineers, conductors, and brakemen) may remain on duty and by allowing those employees to get adequate periods of rest before returning for their next shift. The current version of the Act divides employees' time into three categories: time on duty, time off duty, and so-called "limbo time." Employees (1) may remain on duty for no more than 12 consecutive hours, and having worked for that period, must then be given at least 10 consecutive hours off duty, and (2) must be given at least 8 consecutive hours off duty in every 24-hour period. 49 U.S.C. § 21103(a). Once a train crew has been on duty for 12 consecutive hours without reaching its destination, it has "expired" and can no longer lawfully operate the train. At or shortly before the time when the 12 hours elapse, the train is "tied up" (*i.e.*, parked and secured), and then the "expired" or "outlawed" crew waits (either on the train or elsewhere) for a van, another train, or some other form of transport to bring a relief crew and to pick up the expired crew members and transport them to their "place of final release," where they commence their time off duty. Time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty, *id.* § 21103(b)(4); rather, it is, in the parlance of the industry, "limbo time." The sole question here is whether the time spent *waiting* for deadhead transportation, after the crew has completed its duty assignment, is "time on duty," within the meaning of the Act. The Unions claim that it is; the respondents (both the railroads and the FRA) disagree.

2. As the Seventh Circuit, sitting *en banc*, unanimously held, "the statute itself resolves this issue quite

clearly." 44 F.3d at 443. That ruling gave rise to a circuit split only because a panel of the Ninth Circuit in *United Transportation Union v. Skinner*, 975 F.2d 1421 (1992), had previously interpreted the HSA in a manner contrary to the Act's text, structure, purpose, legislative history, and longstanding administrative interpretation by the FRA, the agency charged with the Act's enforcement.

3. As a diversion from the clear-cut issue of statutory interpretation presented here, the Unions argue that giving effect to Congress's clear intent will make America's railroads less safe and that therefore waiting time should be deducted from the Act's 12-hour maximum—an argument better directed to Congress than to this Court. Moreover, the Unions have constructed their "safety" argument by piling inference upon inference and by ignoring the extensive empirical evidence demonstrating that railroading is a safe industry, that the industry's safety record is continuing to improve, and that the Act's longstanding interpretation, as recently reaffirmed by the Seventh Circuit, presents not the slightest threat to that progress.

ARGUMENT

I. THE STATUTE ITSELF RESOLVES THIS QUESTION QUITE CLEARLY.

As the Seventh Circuit recognized, 44 F.3d at 443, this case presents a straightforward question of statutory interpretation—whether time that a train crew spends waiting for deadhead transportation is "time on duty" under the Hours of Service Act—with a straightforward answer: No.

This Court stated in *Chicago & Alton Railroad Co. v. United States*, 247 U.S. 197 (1918), that "[t]he purpose of the statute is to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task." *Id.* at 199. As originally enacted in 1907, the

HSA limited train crews to 16 continuous hours of operating trains. Act of Mar. 4, 1907, ch. 2939, § 2, 34 Stat. 1416. The Act also imposes mandatory time off duty before employees can resume their operating duties. An employee who has worked the maximum shift must receive 10 consecutive hours off duty. 49 U.S.C. § 21103 (a)(2). And no employee can be called to duty unless he or she has received 8 continuous hours of time off duty in the preceding 24-hour interval. *Id.* § 21103 (a)(1). Case law interpreting the 1907 Act made it clear that time spent in deadhead transportation—either to or from a duty assignment—was to be treated as time *off* duty. *See, e.g., United States v. Great Northern Ry. Co.*, 285 F. 152, 152-54 (9th Cir. 1922).

In 1969 Congress amended the Act to reduce the maximum shift to 12 hours. Pub. L. No. 91-169, § 1, 83 Stat. 463 (1969) (codified as amended at 49 U.S.C. § 21103(a)(2)). It also added to the Act a sentence providing that "[t]ime spent in deadhead transportation to a duty assignment is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty." 49 U.S.C. § 21103(b)(4).[4] That provision was the product of a compromise between labor, which wanted to amend the Act to count all deadheading as "time on duty," and industry, which wanted to continue treating all deadheading as "time off duty." *See, e.g., Hours of Service Act Amendments of 1969: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 76 (1969) [hereinafter *1969 House*

[4] The recodified Act is quoted *supra*. As originally enacted in 1969, the sentence read: "Time on duty . . . shall include . . . [t]ime spent in deadhead transportation by an employee to a duty assignment: *Provided*, That time spent in deadhead transportation by an employee from duty to his point of final release shall not be counted in computing time off duty." Pub. L. No. 91-169, § 1(b)(3)(C), 83 Stat. 463 (1969) (codified at 45 U.S.C. § 61(b)(3)(C) (1970)).

Hearings] (statement of Charles J. Coughlin, Grand Chief Engineer, Brotherhood of Locomotive Engineers); *id.* at 134-35 (statement of R.R. Manion, Vice President, Operations and Maintenance Dep't, AAR); *see also* S. Rep. No. 604, 91st Cong., 1st Sess. 5 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1636, 1638-39. As a concession to labor, time spent in deadhead transportation *to* a duty assignment was categorized as "time on duty"; as a concession to the railroads, time spent in deadhead transportation *from* a duty assignment was *not* deemed "time on duty." However, to address labor's concern that employees get a full opportunity to rest while off duty, Congress categorized deadhead transportation from duty to the place of final release as neither "time on duty" *nor* "time off duty" and instead created a third category, which came to be known as "limbo time." Thus, time spent in such transportation could not be counted against an employee's 8- or 10-hour rest period. *See* H.R. Rep. No. 469, 91st Cong., 1st Sess. 3, 7-8 (1969) (describing the committee substitute amendment which created limbo time); *see also* 115 Cong. Rec. 29,318 (1969) (statement of Rep. Staggers); *id.* at 29,320 (statement of Rep. Springer); *id.* (statement of Rep. Skubitz); *id.* at 29,321 (statement of Rep. Olsen); *id.* at 29,325-26 (statement of Rep. Pickle).

The legislative compromise worked out in 1969 was more than a matter of political convenience; it had a logic that bolstered the Act's fundamental purpose—to make railroads safer by preventing fatigued workers from operating *moving* trains. *See* 49 U.S.C. § 21103(b)(2) ("Time the [train] employee is engaged in or connected with the movement of a train is time on duty."); *id.* § 21101(5) (defining a "train employee" as "an individual engaged in or connected with the movement of a train").[5] Spend-

[5] *See also* S. Rep. No. 604, 91st Cong., 1st Sess. 2, 5 1969 (amending the House-passed bill to cover any "employee" engaged in or connected with the "movement," rather than the mere "operation," of a train), *reprinted in* 1969 U.S.C.C.A.N. 1636, 1637.

ing several hours in deadhead transportation immediately *prior to* duty could increase the chances of crew members becoming fatigued by the latter part of their 12-hour shifts, at a time when they would still be responsible for the operation of a moving train. Counting the time spent deadheading *to* an assignment as "time on duty" therefore served the Act's purpose by ensuring that they would not be operating a train more than 12 hours after reporting for duty. But crew members who have finished all of their duties and are deadheading to their place of final release present absolutely no threat to safety: all they have to do is sit (or sleep) in the deadhead transportation until it reaches its destination at the place of final release, and then go to bed. They will get a minimum of 8 or 10 hours off duty before they engage in any further activity related to the movement of a train.

Precisely the same logic applies to the time spent *waiting* for deadhead transportation to the place of final release. Once the train is tied up, and the crew has "expired" under the Act, its members are not required or expected to perform *any* further duties until *after* their next 8- or 10-hour rest period. They literally may (and often do) adjourn to a restaurant or coffee shop while awaiting the arrival of their deadhead transport.[6] Because of their complete lack of further responsibilities,[7] expired

[6] Once the expired crew members tie up the train, set the brakes, and remove the locomotive's detachable reverser handle (which is analogous to removing an automobile's transmission lever), the train is rendered immobile. It is then customary and safe to leave the train unattended, even if its engine is running.

[7] Although the expired crew is under no *duty* while waiting for deadhead transportation, if crew members were to observe an unusual circumstance that could threaten the safety of the railroad or their fellow workers (*e.g.*, an act of vandalism or a hazardous condition on a passing train), common sense would dictate that they report that observation; but the failure to do so would not subject them to discipline. *Cf. Atchison, T. & S.F. Ry. Co. v. United States*, 269 U.S. 266 (1925) (yardmaster was not an employee "on duty," within the meaning of the HSA, merely because he and

crew members' time spent waiting for deadhead transportation—like the time they spend *in* deadhead transportation—should be treated as limbo time.[8]

The legislative history of the December 1969 amendments to the Act certainly does not contradict that conclusion.[9] The compromise, described *supra*, that resulted in the creation of limbo time was not reached until *after* the House committee held its hearings. For that reason, the Unions' citation to the July 1969 House testimony of Mr. R.R. Manion, *amicus* AAR's then-vice president for operations and maintenance, is entirely inapposite. Mr. Manion was testifying against an early, union-endorsed version of H.R. 8449 which would have included as time on duty "[t]ime spent in deadhead transportation by an

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a tower man engaged in occasional telephone conversations about the movement of freight cars to and from a yard).

[8] Because the Unions' brief ignores this point, it confuses two entirely distinct categories of time: time spent in, or waiting for, deadhead transportation from duty to the place of final release, which is governed by 49 U.S.C. § 21103(b)(4); and "interim period[s] available for rest at a place other than a designated terminal," which are governed by *id.* §§ 21103(b)(5) and 21101(1). By definition, an "*interim* period," *id.* § 21103(b)(5) (emphasis added), is a period of time sandwiched between two periods of time on duty; immediately before *and after* an *interim* period, the crew is engaged in the movement of a train. By contrast, time spent in, or waiting for, deadhead transportation is followed by time *off* duty and therefore bears no direct effect on the safe movement of a train.

[9] The legislative history of the 1969 amendments shows that the 91st Congress understood time spent waiting for deadhead transportation—like time spent in deadhead transportation—to be time *off* duty under the version of the Act that had been in effect since 1907. *See, e.g., 1969 House Hearings*, at 114-15 (statement of Charles J. Coughlin, Grand Chief Engineer, Brotherhood of Locomotive Engineers); *see also id.* at 134 (Statement of R. R. Manion, Vice President, Operations and Maintenance Dep't, AAR) ("Under established interpretations of the existing hours-of-service law, deadhead time is not considered to be time on duty, and time so spent is not governed by the 16-hour limit.").

employee to *or from* duty assignment." H.R. 8449, 91st Cong., 1st Sess. § 1(b)(3)(C) (1969) (emphasis added), *reprinted in 1969 House Hearings*, at 2; *see also 1969 House Hearings*, at 134-35 (statement of R.R. Manion, Vice President, Operations and Maintenance Dep't, AAR) (criticizing H.R. 8449 because it would designate *all* deadheading as "time on duty"). The point Mr. Manion made at the 1969 House hearing—that if a crew expired "in the country" (*i.e.*, not at a designated terminal) the railroad would be violating the Act merely by deadheading the crew to its place of final release—was undeniably true (and indeed, rather obvious) under the terms of H.R. 8449, as it was then drafted. But Mr. Manion's point is entirely irrelevant to the proper interpretation of the 1969 amendments as Congress actually enacted them.[10]

Moreover, when taken as a whole, Mr. Manion's testimony clearly supports the Seventh Circuit's interpretation. He explained to the House committee that railroad operations would suffer greatly if deadheading from a work assignment were considered time on duty because "the crew [members could not] be transported at all in any direction upon the expiration of the maximum time limit"; thus, the Act as so amended would require the railroad "to leave them where they are, perhaps in open country, perhaps in bad weather." *Id.* at 134. The House, con-

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[10] The Unions' brief makes much of the fact that § 1(b)(3)(A) of H.R. 8449, which Mr. Manion discussed in his testimony, *was* enacted without amendment. *See* Br. for Pet'rs, at 20-21. Their argument is misguided for two reasons. First, § 1(b)(3)(A) of the bill, now codified at 49 U.S.C. § 21103(b)(5), concerns "[a]n interim period available for rest at a place other than a designated terminal," which, as explained *supra* at note 8, is entirely irrelevant to the question presented in this case. Second, that section of the Act *was* effectively amended in 1978 by the passage of Public Law No. 95-574, § 6, 92 Stat. 2461, which resolved a circuit split (*compare United States v. Atchison, T. & S.F. Ry. Co.*, 525 F.2d 1184 (9th Cir. 1975), *cert. denied*, 425 U.S. 992 (1976), *with United States v. St. Louis-S.F. Ry. Co.*, 572 F.2d 1224 (8th Cir.) (per curiam), *cert. dismissed*, 439 U.S. 973 (1978)) by statutorily defining the term "designated terminal."

sistent with Mr. Manion's description of the impracticality of labor's position, refused to designate deadheading from a work assignment as time on duty when it amended the Act later in 1969. The absence of any legislative history to support the Unions' interpretation of those amendments is only underscored by their willingness to cite Mr. Manion's testimony entirely out of context. *See* Br. for Pet'rs, at 20-21.

Following the compromise of 1969, the FRA took the position that when crew members are relieved of all train-operating responsibilities but must await the arrival of deadhead transportation to their place of final release, the time spent waiting should be classified as limbo time. *See, e.g.*, Pet. App. 34a-41a (Letter from FRA Assistant Chief Counsel Gregory B. McBride to Lawrence M. Mann (Aug. 4, 1989)). The FRA recognized that classifying such waiting time as "time on duty" would not enhance railroad safety, because the expired crew members will not perform any further operating duties until they have had their statutorily-mandated period of rest; hence, any temporary fatigue would pose no danger. *Id.* at 37a.

Beginning in the 1970s unions representing locomotive engineers and other crew members lobbied Congress for further reductions in the 12-hour maximum,[11] but their

[11] *See, e.g.*, H.R. 8365, 95th Cong., 1st Sess. (1977), *reprinted in Railroad Safety Authorization for Fiscal Year 1979: Hearings Before the Subcomm. on Transp. and Commerce of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 10-11 (1978) (amending the Act to reduce its 12-hour maximum for time on duty immediately to 10 hours and, after a two-year transitional period, to 8 hours); U.S. General Accounting Office, GAO/RCED-92-133, Railroad Safety: Engineer Work Shift Length and Schedule Variability 3-4 (1992) ("BLE [(the Brotherhood of Locomotive Engineers)] supports changes to the act, including reducing the maximum allowable work period from 12 to 10 hours . . . ."); *Rail Safety: GAO Report Predicts Only Minor Impact of 12-Hour Shift Limit On Accident Rate*, O.S.H. Daily (BNA), June 22, 1992 ("The Brotherhood of Locomotive Engineers has lobbied Congress to reduce the maximum 12-hour shifts . . . ."); *Leave Hours of Service*

efforts were rebuffed. With the prospects for a statutory amendment looking dim, the unions turned to the courts. They filed lawsuits in Oregon and California challenging the FRA's two-decade-old interpretation of the Act. If waiting time were deemed time on duty, rather than limbo time, no railroad could risk running a crew up to the 12-hour maximum unless it was certain that a deadhead transport would be waiting at the precise time and place where the crew would expire; if the railroad miscalculated, it would be subject to civil penalties ranging from $500 to $10,000 per violation. *See* 49 U.S.C. § 21303(a). Thus, by obtaining a court ruling that reclassified waiting time as "time on duty," the unions sought effectively to undermine the statutory 12-hour maximum.

On appeal from the Oregon and California decisions, a panel of the Ninth Circuit held that time spent waiting for deadhead transportation should count against (and thus effectively reduce) the Act's 12-hour rule, rather than counting as limbo time. *See United Transp. Union v. Skinner*, 975 F.2d at 1422. The Ninth Circuit's decision was unprecedented: prior to the Oregon and California cases, no court had ever called into question the FRA's policy of treating waiting time as limbo time.[12] Judge Reinhardt's opinion for the panel apparently rested on the hypothetical possibility that a railroad *could* impose additional duties on expired crew members while they awaited transportation. *Id.* at 1423-24, 1426, 1428. Although the

Act Intact, GAO Tells Congress, US Rail News, June 24, 1992 (quoting Leroy Jones, Vice President and National Legislative Representative for the Brotherhood of Locomotive Engineers) ("BLE has pressed for 10-hour work days"). The unions have proposed these reductions in the Act's 12-hour maximum even while recognizing that such changes "would 'cripple' the industry." *Locomotive Engineers President Advocates Legislative Reforms to Improve Rail Safety*, Daily Labor Report No. 73 (BNA), Apr. 16, 1986, at A-3 (quoting BLE President John F. Sytsma's statement at a meeting with reporters).

[12] *United States v. Pennsylvania Railroad Co.*, 275 F. Supp. 345 (W.D. Pa. 1967), is irrelevant here because it predated the 1969 amendments which created limbo time.

FRA continued to disagree with the Ninth Circuit's rationale, it decided to apply the court's ruling nationwide, to ensure "uniform application of the Act." 58 Fed. Reg. 18,164 (1993). Thus, through a combination of the Ninth Circuit's judicial activism and the FRA's administrative acquiescence, the unions won the victory that had eluded them in Congress: reduction of the Act's 12-hour rule.

II. THE UNIONS' "SAFETY" ARGUMENT IS INSUPPORTABLE.

Given the tenuousness of their legal position, it is not surprising that the Unions attempt to divert this Court's attention from the rather simple question of statutory interpretation presented here. They claim that the Seventh Circuit's decision implicates a "serious safety issue," yet the extra-record evidence they cite has little to do with the status of "waiting time" under the HSA. Furthermore, the Unions' "safety" argument ignores the extensive empirical evidence demonstrating that railroading is a safe industry, that the industry's safety record is continuing to improve, and that the Act's longstanding interpretation, as recently reaffirmed by the Seventh Circuit, presents no threat to that progress.

A. The Railroad Industry Has an Exemplary Safety Record.

Contrary to the impression left by the Unions' brief, *see* Br. for Pet'rs, at 29-37, railroading is a safe industry. Statistics from the United States Department of Labor show that railroad employees have lower rates of occupational injury and illness than workers in the trucking, air transportation, construction, and manufacturing industries. *See* National Safety Council, *Accident Facts* 44-48 (1994 ed.) (citing Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Injuries and Illnesses in the United States By Industry, 1992* (1994)). Moreover, the railroads' safety record has improved dramatically in recent years. Since 1981 the amount of freight carried by rail

has grown, yet the train accident rate and the employee injury rate have both been cut in half. In 1981 there were 8.25 train accidents per million train miles; by 1994, that figure had dropped to 3.82. *See* FRA Accident/Incident Bulletin Nos. 150-163, Tables S11, S50, 1, 7, 13, 16. During the same period, the on-duty employee injury rate fell from 10.08 injuries per 200,000 person-hours to 5.06 injuries. *See* FRA Accident/Incident Bulletin Nos. 154, 161, 163, Tables 1, 9. These improvements have resulted from a combination of factors, including technological advances in the design of freight cars, wheels, and devices for inspecting the rails, as well as other developments arising from research conducted at *amicus* AAR's Transportation Technology Center in Colorado; the capital expenditures in excess of $50 billion that freight railroads have spent since 1980 to improve track, signals, equipment, and information systems; and the railroads' continuing compliance with the HSA. *See* Economics, Policy and Statistics Dep't, AAR, *Railroad Facts* 43 (1994 ed.); Economics, Policy and Statistics Dep't, AAR, *Railroad Facts* 55 (1989 ed.); U.S. General Accounting Office, GAO/RCED-92-133, Railroad Safety: Engineer Work Shift Length and Schedule Variability 2 (1992) [hereinafter GAO 1992 Report] (estimating that 99.4% of the time, engineers were given at least 10 hours off duty following a work period of 12 or more hours,[13] and failing to find a single instance in which an engineer spent fewer than 8 hours off duty in any 24-hour period). Thus, the Unions' description of the railroad industry more closely resembles a nineteenth-century caricature than a fair portrayal of current reality.

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[13] A "work period" includes not only time on duty, but also time spent waiting for deadhead transportation and time spent in deadhead transportation from a duty assignment to the place of final release. Therefore, a work period may exceed 12 hours even though the railroad fully complied with the HSA and the employee spent less than 12 consecutive hours on duty.

B. The Mechanics and Economics of Train-Crew Work Schedules.

The Unions' brief not only obscures the railroads' excellent safety record; it also relies on irrelevant literature about "victims of chronic sleep deprivation," Br. for Pet'rs, at 11, which has nothing to do with the only issue presented here: whether time spent waiting for deadhead transportation is "time on duty" under the HSA. Upon closer examination, it turns out that the relationship between the designation of waiting time under the HSA and sleep deprivation is nonexistent. To understand why, one must first understand how railroads schedule their train crews.

At the outset one must distinguish yard operations from mainline (or road) operations. Yard tracks are located within defined limits inside a terminal and are used primarily for making up or breaking up trains and for storing cars. Train movements on yard tracks are authorized by yardmasters, and yard crews typically have fixed work schedules with shifts that start at the same time each day, not unlike employees in other industries. Mainline tracks, which generally carry traffic from one terminal to another, consist of tracks on which trains operate under authority of a train dispatcher. The times of operation of some mainline trains, however, can be unpredictable, as they may not be determined long in advance of departure. For example, shippers often elect to "release" a train not at any preordained hour, but rather at the moment when its cargo is fully loaded (*e.g.*, in the case of a unit-coal or unit-container train). Mainline operations—not yard operations—are at issue here.

Because of the distances covered in mainline operations, and because employees must adhere to the schedules of the trains and not vice versa, there is an inherent limit on how regular a mainline crew's schedule can be. To deal with the inherent irregularity of employees' schedules, railroads use "crew-calling systems" that notify their engineers [14] to come to work at specific times. Most mainline engineers are assigned to a "pool" from which an eligible engineer is selected for each train that is ready for operation. Each pool covers a specific territory or type of service. When the train dispatcher or yardmaster authorizes a train to run, he notifies the crew caller, who in turn selects an engineer from the top of the relevant pool list. Selection from the pool is structured to comply both with the rules promulgated under any applicable collective bargaining agreement and with the provisions of the HSA. Of course, under the latter, engineers are not eligible for selection from the pool unless they have had (a) at least 8 consecutive hours off duty during the prior 24 hours, and (b) at least 10 consecutive hours off duty since their previous shift, if that previous shift included the full 12 hours of time on duty allowed by the Act.

Typically, the engineer is notified at least 1 to 3 hours before the train's authorized departure time. Railroads have gone to considerable lengths to increase the certainty of engineers' work schedules. In addition to the fact that engineers know that they are statutorily entitled to either 8 or 10 consecutive hours of rest (depending on the length of their previous time on duty), crew-calling systems provide the engineers with information about anticipated train schedules and pool lists, which help them to predict the likely starting time of their next shift and to plan their personal activities (including sleep) accordingly.[15] A recent study by the United States General Accounting Office (GAO) found that "[t]hese systems enable

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[14] For illustrative purposes, we speak here of engineers, but the same reasoning applies to other operating employees covered by the HSA because their schedules are identical in all relevant respects to engineers.

[15] Depending on the railroad, engineers learn this information by speaking directly with a crew caller, by accessing a specialized database on a computer terminal, or by telephoning a computerized, voice-automated data system.

engineers to generally predict their next work shift at least 8 to 12 hours prior to reporting." U.S. General Accounting Office, GAO/RCED-93-160BR, Railroad Safety: Human Factor Accidents and Issues Affecting Engineer Work Schedules 3 (1993) [hereinafter GAO 1993 Report].[16]

Merely describing the crew-calling systems and the mandates of the HSA could leave an inaccurate impression of the typical work schedule of a mainline crew member. *See, e.g.*, Br. for Pet'rs, at 12 (highlighting the hypothetical possibility that a crew could work 112 hours per week under the Act). The typical crew member does *not* continually cycle through 12-hour periods of work, followed by 10-hour periods of rest. Rather, the 12-hour limit set by the HSA is an outer bound that has no effect on the vast majority of train employee shifts. *See* GAO 1992 Report, at 18 (estimating that only 3.1% of all engineers' work periods, including time spent waiting for and time spent in deadhead transportation, exceed 12 hours);[17] *see also id.* at 4 (although the Act in theory would allow engineers to work consecutive 8-hour-on, 8-hour-off cycles for extended periods, GAO found no evidence of that actually occurring). The HSA, as amended in 1969, expressly provides that its 12-hour provision is a "maximum" and that "[s]horter hours of service and time on duty of an employee are proper subjects for collective bargaining between a railroad carrier and its employees." 49 U.S.C. § 21107.[18] Furthermore, engineers

[16] In addition to the "pool engineers" described *supra*, there are "extra board" engineers who fill in for their colleagues when the latter are unable to work due to illness, vacation, personal days, or other reasons.

[17] Because GAO's estimate was based on a probability sample of 1990 work schedules for 124 engineers employed by four railroads, its conclusions may not be generalizable to all engineers, working for all railroads, in all time periods. *See id.* at 17-18.

[18] The Senate report for the 1969 amendments explained that "this section should not only permit but should also promote collective bargaining in the hope that further resort to legislation will not be sought by either railroad management or labor." S. Rep. No. 604, 91st Cong., 1st Sess. 10 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1636, 1642; *see also* 115 Cong. Rec. 29,321 (1969) (statement of Rep. Skubitz) ("[W]e are setting upper limits beyond which an employer or a union cannot bargain away the time of the worker. Both safety and public policy on labor practices dictate that such a limitation is proper. Below those limits the parties can go to it and hammer out any kind of an agreement they please.").

in "long pools," *i.e.*, pools that cover operations between distant terminals, are more likely to approach 12 consecutive hours on duty; but those very same engineers tend to get the longest breaks *between* work shifts because railroad labor agreements typically attempt to equalize the total monthly mileage in their pools. *See, e.g.*, J.A. 31a (referring to "monthly quotas" of 3800 or 3900 miles per engineer).

According to the GAO, approximately a quarter of all mainline engineer shifts exceed 10 or 11 hours, and approximately a quarter of the engineers work five or more shifts in a given week, which suggests that a significant fraction of mainline engineers work at least 50 hours per week. *See* GAO 1993 Report, at 18, 20. But that same study also found that the *average* shift for a mainline engineer lasted between 8 and 9 hours, and that the average "shift density" (number of shifts in a two-week period) was 7.7 (as compared with 10.0 for a regular, five-day-a-week job). *See id.* Thus, the average mainline engineer works roughly 33 to 35 hours per week. Although *amicus* would not for a moment suggest that operating a freight train is easy work, it is simply incorrect, as an empirical matter, to conclude that most engineers and crew members are overworked and sleep-deprived. On the whole, their hours may by necessity be somewhat irregular, but they are not excessive.

Furthermore, although the Act places no statutory limits on limbo time, the railroads have enormous incen-

tives to minimize the amount of time that train crews spend deadheading and waiting for deadhead transportation. First, railroads are in the business of providing timely and reliable services to shippers; the economic demands of an efficient and competitive freight system provide the railroads with ample incentive to ensure that trains and their crews do not often sit idle for extended periods of time. Second, under most collective bargaining agreements, a railroad must pay its crews while they await transportation and while they deadhead to their place of final release, even though they are performing absolutely no duties. *See* 58 Fed. Reg. 18,164 (1993) (referring to time spent awaiting deadhead transportation as "wholly unproductive time"). And third, waiting time and deadheading time delay the start of crew members' time off duty, which in turn delays the start of their next shift. A railroad that expended too much of its employees' time waiting for deadhead transportation would have to hire additional crew members to fill its pools. *See* J.A. 115.[19] Thus, aside from their interests in complying with the HSA, railroads have great *business* incentives to minimize waiting time.

C. The Relationship Between the HSA, Work Schedules, and Safety.

The Unions' brief implies that there is a causal chain that stretches from their interpretation of "time on duty" under the HSA, to changes in mainline crews' work schedules, to reduced fatigue for engineers and other crew members, to increased rail safety. *See* Br. for Pet'rs, at 11-12, 29-37. Yet they are unable to adduce solid proof for *any* link in that chain. Indeed, data gleaned from recent GAO studies shows that the argument is baseless.

In an effort to isolate the variables that contributed to what the FRA terms "human-factor-caused accidents" (as

[19] Of course, exigencies inherent to the railroading business, such as inclement weather and accidents, prevent railroads from altogether eliminating long waits for deadhead transportation.

opposed to accidents caused by mechanical, weather-related, or other factors), the GAO examined the statistical relationship between, on the one hand, the number of accidents and accident rates,[20] and, on the other hand, five distinct work-schedule characteristics: (1) the type of shift (yard or mainline); (2) the time of day; (3) the hour of the shift (*i.e.*, whether the accident occurred early or late in the engineer's shift); (4) shift density and length; and (5) the variability of the shifts' start-times.[21] The results of the GAO study are worth summarizing here for two reasons: first, they are not intuitively obvious; and second, they demonstrate the fatuousness of the Unions' argument that railroad safety could somehow be enhanced by treating as "time on duty" the time that a crew spends waiting for deadhead transportation.

First, as to the type of shift, the GAO found that, from 1989 to 1992 inclusive, railroads reported 3817 "human-factor-caused" accidents to the FRA. Only 24% of those accidents occurred on mainline track. *See* GAO 1993 Report, at 8. However, when the GAO calculated, for two railroads, the accident *rates*, *i.e.*, the number of accidents per 100,000 engineer work hours, it concluded that the rates were 7% higher for mainline shifts than for yard shifts in the case of one railroad and 17% higher for the

[20] In interpreting the GAO's data, it is important to distinguish (1) data concerning the absolute *number* of accidents (which GAO obtained from the database of all "human-factor-caused accidents" that railroads reported to the FRA between January 1, 1989, and December 31, 1992), and (2) data concerning the accident *rate*, which GAO calculated as accidents per 100,000 engineer work hours. Generally, statistics reflecting accident rates, rather than the raw number of accidents, are most useful in estimating the causes of accidents; but the GAO's accident rate data is based on random samples from particular railroads and therefore may not be generalizable to all railroads. *See* GAO 1993 Report, at 2 & n.4; GAO 1992 Report, at 1-2 & n.2.

[21] The GAO acknowledged that other factors (*e.g.*, training, experience, traffic conditions, and the type and complexity of a route) could also contribute to accidents, *see* GAO 1992 Report, at 3, but only the work-schedule characteristics studied by the GAO could be relevant to the legal issue presented here.

second railroad. *See id.* at 13. Of course, even the Unions do not contend here that the designation under the HSA of time spent waiting for deadhead transportation will have any appreciable effect on the relative balance of yard versus mainline work. Therefore, the type of shift (yard versus mainline) is a work characteristic with no direct bearing on the question at hand.

Second, as for time of day, 38.8% of all mainline accidents from 1989 to 1992 took place between 10:00 a.m. and 6:00 p.m., more than took place during any other eight-hour block of time. *See* GAO 1993 Report, at 12. That statistic, however, apparently follows from the fact that more trains are running during those hours. When GAO examined the accident *rates* for two specific railroads, it found that the rates were slightly higher during the non-daylight hours (6:00 p.m. to 6:00 a.m.) for one railroad; the other railroad showed no consistent pattern. *See id.* at 13-15; *see also* GAO 1992 Report, at 3 (estimating that the accident rates for four railroads in 1990 were highest between 2:00 a.m. and 6:00 a.m.). However, the time of day that a train is operating has much to do with the demands that shippers place on the railroads and little or nothing to do with the proper designation of waiting time under the HSA.

Third, and more significantly, over 95% of the human-factor-caused accidents reported to the FRA occurred *before* an engineer had worked 10 hours in a shift. *See* GAO 1993 Report, at 8. More than three-quarters of the accidents occurred in the second through eighth hours of a shift. *See id.* at 9-11. Only 2.3% of all mainline accidents occurred after an engineer had worked 11 hours in a shift. *See id.* at 11. When GAO analyzed accident *rates* by the hour of the engineer's shift, the results were entirely ambiguous: The highest rates for one railroad were found in the second, third, fourth, fifth, and eleventh hours of the shifts; for the other railroad, in the first, second, sixth, ninth, and twelfth hours. *See id.* at 15-16. Understandably, the GAO concluded that its "findings do not indicate one way or another if accidents are more

likely to happen later in the engineer's shift." *Id.* at 15. Unlike the yard-vs.-mainline and time-of-day characteristics discussed *supra*, the GAO's findings as to the hour of the shift *are* relevant here: but the evidence simply does not indicate that any safety advantage would accrue if the Unions were successful in achieving through judicial intervention what they have failed to achieve through the legislative process—lowering the Act's 12-hour maximum time on duty.

Fourth, the GAO study showed that shift density and shift length—defined here as the number and length of shifts worked in the previous two-week period—had little correlation with accident rates. In one railroad, the engineers who had been involved in an accident had, on average, precisely the same number of starts in the two weeks leading up to the accident as the engineers whose records were accident-free. *See id.* at 18. Interestingly, the engineers who had accidents actually had a *shorter* average shift length during the two-week period than the engineers without accidents. *See id.* In the other railroad, the engineers who had been involved in an accident had almost exactly the same average shift length as their fellow engineers, but the engineers with accidents averaged 8.8 starts in the previous two weeks, while their colleagues had only 7.8 starts. *See id.* Again, the results are ambiguous: they suggest (albeit rather weakly) that accident rates could be improved by reducing the number of shifts per week and *increasing* the average length of each shift. Those findings, however, *undermine* the Unions' argument here. Considering time spent waiting for deadhead transportation as "time on duty" rather than limbo time would tend, on average, to *shorten* the length of shifts (because waiting time will have to be deducted from the current 12-hour maximum of time on duty) and to *increase* shift density (because reducing limbo time would tend to decrease the amount of time between shift starts). Thus, GAO's data on shift density and length suggest that the Unions' interpretation of the HSA could have a *negative* impact on railroad safety.

The fifth and final work-schedule characteristic analyzed by the GAO was "shift variability," a measure of the change in start times from one work shift to the next.[22] As explained *supra*, variability is much higher for mainline shifts than for yard shifts because most yard employees have regular schedules that begin at the same time every day. *See id.* at 20. As for mainline employees, the results of the GAO study were not conclusive. For one of the two railroads studied by GAO, there was no clear relationship between accident rates and variability. For the other railroad, mainline shifts that resulted in accidents had an average variability of 6.6 hours, while mainline shifts in general had an average variability of only 4.7 hours. *See id.* at 20-21. GAO hypothesized that, for that one particular railroad, during the period studied, shift variability may have had some "link[] to engineer fatigue and possibly to human-factor-caused accidents." *Id.* at 21.

It is not at all clear, however, that designating time spent waiting for deadhead transportation as "time on duty" would reduce variability. As explained *supra*, such a designation would effectively reduce the Act's 12-hour maximum. In 1992 Congress asked the GAO to analyze the Brotherhood of Locomotive Engineers' proposal to amend the Act by reducing the 12-hour maximum to 10 hours. The GAO concluded that such an amendment could actually "*increase* the variability . . . of engineers' work cycles, . . . [which] could, in turn, increase fatigue for engineers." GAO 1992 Report, at 2 (emphasis added); *see also id.* at 10-11.

That conclusion is correct because the current statutorily-mandated periods—a 12-hour maximum period of time on duty, followed by a brief period of limbo time and then a 10-hour minimum period of time off duty—

[22] For example, a train employee's initial shift in a work period might start at 8:00 a.m. If the next shift starts at 7:00 a.m. (or at 9:00 a.m.), the variability of the second shift would be one hour. By definition, the maximum variability possible from one shift to the next is 12 hours.

readily lend themselves to a 24-hour cycle. For example, a crew might begin its duty assignment at 8:00 a.m. on a Monday morning, expire at 8:00 p.m., wait for deadhead transportation (either on the train or at a nearby cafe) until 8:15 or 8:30 p.m., reach its place of final release (via a deadhead van or other transport) at 10:00 p.m., and enjoy time off duty until 8:00 on Tuesday morning—the same time of day that it began its previous shift. Under that scenario, the crew's shift variability is zero because the 12 hours on duty plus the 10 hours off duty plus 2 hours of deadheading and waiting time add up to 24 hours. If the waiting time and time spent in deadhead transportation were only an hour, the crew might begin work at 8:00 a.m. on Monday, 7:00 a.m. on Tuesday, and 6:00 a.m. on Wednesday—an average shift variability of one hour. Shortening the 12-hour maximum—which would be the effective result of adopting the HSA interpretation urged here by the Unions—would tend to *increase* shift variability by making the full work/rest cycle too short to correspond to a 24-hour day.[23] That

[23] As noted *supra*, the GAO found, for one railroad, that the variability of mainline engineer shifts that resulted in accidents averaged just over 6½ hours. Such a high level of variability cannot possibly be attributed to the HSA, no matter how it is interpreted; rather, it can only be explained as a function of the irregularity of schedules for mainline trains. An engineer whose shift variability averages 6½ hours is getting either considerably less than 12 consecutive hours of time on duty or considerably more than 10 consecutive hours of time off duty, and hence his work schedule is not directly shaped by application of the provisions of the HSA. If the engineer reported for duty on Monday morning at 8:00 a.m., his Tuesday shift would have to begin either at 1:30 a.m. or at 2:30 p.m. in order to have 6½ hours of variability. On the one hand, if his Tuesday shift starts at 1:30 a.m., then his time off duty began no later than 5:30 p.m. on Monday (to allow for the Act's mandatory 8-hour rest period), and therefore his Monday tour of duty (which began at 8:00 a.m.) could have been no more than 9½ hours long—far less than the 12-hour maximum under the Act. On the other hand, if his Tuesday shift starts at 2:30 p.m., even if he worked a full 12 hours of time on duty on Monday (thus finishing up at 8:00 p.m.), he would have had 18½

result would not serve to foster the recent progress that railroads have been making in operational safety. Thus, the Unions' "safety" arguments are entirely baseless.

Moreover, at bottom the Unions' arguments call for the legislative amendment—and not merely the judicial reinterpretation—of the Act. Those arguments "are addressed in vain to this Court. Their proper theatre is the halls of Congress . . . ." *Smoot's Case*, 82 U.S. (15 Wall.) 36, 45 (1873).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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hours of limbo time plus time off duty before returning to work. Because 8½-hour periods of limbo time are virtually unheard of, the engineer would in all probability have had far more than the statutory minimum of 10 hours of time off duty. Thus, any train crew member who is averaging 6½ hours of shift variability is clearly doing so because of the demands placed on his schedule by the nature of the railroading business, *see supra* Point II.B.—not because of the application of the HSA.